

Yugoslav war crimes tribunal decides remaining preliminary motions

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individual countries for any damage Europol causes by the use of erroneous data it stores or processes.³ If an alleged victim seeks compensation for infringement on his/her right to privacy in a national court, the European Court could be required to interpret the Europol rules to establish the EU Member's obligations.

Until the issue of the Court's involvement is resolved, Europol must work on a much more limited scope. For instance, Europol can deal with terrorism only two years after the Convention comes into affect.⁴

While Europol's workload has trebled in the last year, it is not able to properly undertake a principal goal of analyzing information until the Convention is in effect since it cannot pool data on a central computer. Its inability to pool data precludes pooling long lists of names, addresses, telephone numbers and bank details that EU police agencies seize from time to time.

Europol handled approximately 2,000 requests for data in 1995, almost double the number of requests in 1994. The increase is due partly to the expansion of its size to include stolen cars, illegal immigration, and the smuggling of radioactive materials.

The EU Justice and Home Affairs Council have adopted a regulation establishing conditions for Europol's management board and the 1994 report of the Europol Drugs Unit.⁵

The evolution of Europol has significance in strengthening international criminal cooperation generally and particularly the role of one of the eminent international organizations. The resolution of the role of the Court and of the other organs of the EU, as well as the respective responsibilities and functions of the EU Members vis-à-vis the EU and individuals, will also be watched for the potential utility as a model for international criminal cooperation in future economic integration organizations.

XI. LAW OF WAR

A. Yugoslav War Crimes Tribunal Decides Remaining Preliminary Motions

by André Klip⁶

On November 14, 1995, the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY) decided the two remaining preliminary motions of the defense. The motion on the principle of *non bis in idem* was denied. The motion on the form of the indictment was partly granted, partly denied.¹

³ Europol Convention, *supra* note 2, Articles 14 and 15 and standards of data protection and responsibility for data protection and Title VI (Articles 38-41) on Liability and Legal Protection.

⁴ *Id.*, Art. 2.

⁵ Janet McEroy, *European Council to Intervene in Europol Blockage*, REUTERS (ECX067 4 OEC 584 PE2305201 BZ-JUSTICE-EUROPOL), Nov. 32, 1995.

⁶ Dr. André Klip is a lecturer in (international) criminal law at Utrecht University, The Netherlands.

¹ See on these motions, André Klip, *Appeals Chamber Yugoslav War Crimes Tribunal Confirms Jurisdiction*, 11 INT'L ENFORCEMENT L. REP. 505 (Dec. 1995).



With all the preliminary motions decided, the Trial Chamber can now proceed towards the actual trial, which is expected to begin before the summer of 1996.

1. *Decision on the Motion on the Principle of Non Bis In Idem*²¹

The Trial Chamber held that the deferral which occurred in this case does not violate the principle of *non bis in idem*. While the proceedings in Germany may have passed beyond the purely investigative phase, it is undisputed that the accused had not been tried in the full sense. He was neither convicted nor acquitted by the German court. Referring to the Appeals Chamber Decision on jurisdiction of October 2, 1995,²² the Trial Chamber did not find that the accused was actually tried in Germany.

The Trial Chamber found that sufficient guarantees will prevent the accused from a retrial in Germany. Rule 13 of the Rules of Procedure and Evidence of the ICTY empowers the Tribunal to issue an order requesting the discontinuance of a subsequent retrial by any national court.

According to the Trial Chamber Article 14 paragraph 7 of the International Covenant on Civil and Political Rights, which prohibits double jeopardy, is not applicable here. It covers only prosecution within the same state. It should be emphasized that the trial Chamber explicitly finds that there are two separate jurisdictions in this case, Germany and the ICTY. Another jurisprudential position could also be taken, in which there is only one jurisdiction regarding the crimes in Yugoslavia. In that view, the Statute of the ICTY serves as a means to divide tasks of the ICTY and national courts. The primacy of the ICTY to order a deferral could be seen as supporting this view.

According to the Defense the violation of Article 10 of the Statute can be established by the relationship between Articles 9 and 10 of the Statute. The Defense claimed that the Statute permits deferral under Article 9 only under the circumstances described in Article 10 paragraph 2, which are reflected in Rule 9(i) and (ii). The deferral was based upon Rule 9 (iii). The Defense stated that Rule 9(iii) is contrary to the Statute, because it lists situations for deferral not mentioned in the Statute. Therefore, the deferral took place in violation of the principle of *non bis in idem*. The Trial Chamber disagreed, because limiting the authority of the International Tribunal to request deferral to situations described in Article 10 paragraph 2 would restrict its primacy.

To support the view of the interrelatedness of Articles 9 and 10, the Defense drew attention to the statements of representatives of four permanent members of the Security Council, based on a linkage between Articles 9 and 10. The Trial Chamber took no position on the interpretation of these statements nor upon their possible legal effect. It emphasized that under no conceivable interpretation of these declarations there is even a hint that deferral of a case to the ICTY could violate the principle of *non bis in idem*.

The Defense asserted the Tribunal's Rules do not guarantee the pretrial detention that the accused underwent during the deferral procedure will be taken into consideration in sentencing. To this argument, the Trial Chamber held that this is a matter which is best considered by the International Tribunal at the sentencing phase of its proceedings.

2. *Decision on the Motion on the Form of the Indictment*

Most incidents on which the counts of the indictment are based provide the particulars required in Article 18 of the Statute: "a concise statement of the facts of the case and of the crime with which the suspect is charged."

²¹ The author advised the Defense as a consultant on a *pro bono* basis on this motion.

²² See the decision of the Appeals Chamber on the motion on jurisdiction, André Klip, *Appeals Chamber Yugoslav War Crimes Tribunal Confirms Jurisdiction*, 11 INT'L ENFORCEMENT L. REP. 505 (Dec. 1995).



One incident, which gives rise to three counts does not meet these requirements. The paragraph alleges conduct by the accused over a period of a little more than six months. The conduct involves attack, destruction and plunder of residential areas described only as Bosnian Muslim and Croat, the seizure and imprisonment under brutal conditions in three named prison camps of "thousands" of persons, described only as Muslims and Croats, and the "deportation and/or expulsion" of the majority of Muslim and Croat residents of Opstina Prijedor by force or threat of force. According to the Trial Chamber it says nothing specific about the accused's conduct, about the nature and extent of his participation in the several courses of conduct which are alleged over the months in question. If the Prosecution is to persist in relation to the matters alleged in that paragraph, the indictment should be further amended so as to provide the necessary degree of specificity.

The question whether indictment alleges criminal conduct cumulative rather than in the alternative is regarded by the Trial Chamber as a question which will be dealt with in a later stage of the trial, when matters of penalty fall for consideration. In addition, the Trial Chamber stated that penalty must not depend upon whether offenses arising from the same conduct are alleged cumulatively or in the alternative. The penalty is to punish proven criminal conduct and that will not depend upon technicalities of pleading.

XII. FINANCIAL SERVICES ENFORCEMENT COOPERATION

A. U.K. and Italy Conclude MOU for Financial Services Cooperation

The United Kingdom and Italian financial services regulators, SIB and CONSOB, have announced the signing of a memorandum of understanding (MOU) on regulatory cooperation.¹ The purpose of the MOU is to strengthen protection of investors and provide a framework for the exchange of information.

In particular, the exchange of information will be used to identify and investigate possible breaches of laws concerning disclosure obligations in share dealings, fraud, insider dealing, and market manipulation.

Increasingly regulators of financial services are concluding MOUs to cooperate on a host of matters, including securities offenses, financial fraud, and anti-money laundering. While the bulk of the cooperation is bilateral, the International Organization of Securities Cooperation (IOSCO) has helped design and encourage cooperation on a multilateral basis. Other international organizations and associations, such as the Financial Action Task Force and the Basle Group of central bank authorities, have also encouraged the strengthening of cooperation among financial services regulators.

XIII. BIBLIOGRAPHY OF BOOKS, ARTICLES AND DOCUMENTS

By Bruce Zagaris

A. Books

1. *Adjective Enforcement*

Paolo Bernasconi, *Nuovi Strumenti Giudiziari Contro la Criminalità Economica Internazionale* [Nouveaux Instruments Judiciaires Contre la Criminalité Économique Internationale] [New Judicial Instruments against

¹ For background see *News in Brief*, INT'L MONEY MARKETING, December 15, 1995, at 3, col. 4.